Teh Eok Kee & Anor v Tan Chiah Hock & Anor

SUPREME COURT (PULAU PINANG) — CIVIL APPEAL NO 02-149-94
EDGAR JOSEPH JR, MOHAMED DZAIDDIN FCJJ AND ABU MANSOR JCA
8, 18 NOVEMBER 1995

Legal Profession *— Retainer — Authority — Whether solicitor had actual or ostensible authority to bind client contractually — Whether authority flowed from and subject to retainer*

Evidence *— Hearsay — Witness gave testimony in court — Person making statement contained therein not called to court — Whether statement admissible to show state of mind of witness — Whether admissible if opposite party admitted allegation — Whether exceptions to hearsay rule — Evidence Act 1950 s 14*

Evidence *— Hearsay — Statement made by person in privity with parties to the suit — Maker of statement was agent of parties — Whether admissible if maker of statement not called as witness — Evidence Act 1950 s 18(1)*

Civil Procedure *— Admission — Out-of-court admissions by co-parties in a suit — Whether admissible*

The respondents, who were both brothers, were the registered proprietors of a piece of land in Seberang Perai Selatan ('the land'). Prior to 18 April 1990, another brother of the respondents, Mr Tan Weng Hock ('Tan'), who was given an option to sell the land by the respondents, approached Mr CP Ang ('Ang') of Messrs CP Ang & Co ('the firm'), to act as the respondents' solicitor in the sale and purchase transaction of the land. However, Tan's option to sell was only signed by the second respondent. Subsequently, the solicitors for the purchasers ('the appellants') sent a copy of the draft sale and purchase agreement of the land ('the agreement') to Ang, who then directed Tan to hand it to the respondents for their perusal. Ang testified that he was informed by his clerk (who was not called as a witness) that one of the respondents had later instructed him to obtain the fair copy of the agreement and 10% deposit from the appellants' solicitors ('the first part of Ang's testimony'). This was done by the firm in its letter dated 15 May 1990, and was admitted by the respondents. After the firm had received the engrossed copy of the agreement and the deposit, the respondents called at Ang's office. According to Ang, he was informed by his clerk that when the respondents were asked to settle the legal fees, they claimed that Tan, who was the option holder, would be the appropriate person to do so ('the second part of Ang's testimony'). They added that they would like to discuss the matter with Tan first before signing the agreement. However, the respondents argued that they refused to sign the agreement because they were not aware of the matter in question. On 18 June 1990, the respondents wrote to the firm to discharge it from acting on their behalf.

The firm was also requested to hand over the issue document of title of the land that was in its custody to Messrs Goik Ah Kim & Co, who were the respondents' newly appointed solicitors. It was not until 17 August 1990 that the respondents wrote to the firm to inform it that the legal fees would not be settled as it was not authorized to act on their behalf. It was material to note that the respondents had found a new purchaser for the land at a considerably higher price before the dispute in question arose. Dissatisfied, the appellants brought a suit for specific performance of the agreement. The trial judge found in favour of the respondents, on the ground that the firm was not authorized to conclude the agreement on their behalf. The appellant appealed. The issues before the court were: (i) whether the respondents had authorized the firm to conclude a contract of sale and purchase in favour of the appellants; and (ii) whether it could be reasonably inferred from the evidence that the respondents had ratified the unauthorized bargain struck by the firm.

Held, allowing the appeal:

(1) (per **Edgar Joseph Jr FCJ**) It is a question of fact in each case, whether a solicitor has actual or ostensible authority to bind his client contractually. His authority is limited by his instructions, which is also a question of fact. The burden of proof of establishing such authority must rest on the party who alleged it.

(2) (per **Edgar Joseph Jr FCJ**) A solicitor's authority flows from the retainer given to him by his client. It follows that his authority to act is limited by any special condition imposed, and supplemented by any special authority conferred by the retainer. Generally, a solicitor has no general authority to bind his client contractually as a vendor or purchaser of land, unless such authority is expressly conferred upon him or is implicit in the terms of the retainer.

(3) (per **Edgar Joseph Jr FCJ**) The trial judge had considered the first and second parts of Ang's testimony as hearsay, as Ang's clerk who had made the statements therein was not called as a witness. However, having regard to the admission of the events by the respondents, who were parties to the suit, the first part of Ang's testimony should have been admitted on the principle that if a party to a civil suit says he does not dispute the truth of a fact, the opposite party will not be required to prove such fact. Further, the second part of Ang's testimony was admissible pursuant to s 14 of the Evidence Act 1950 ('the Act'), as the statement therein was relevant to show Ang's state of mind, ie that he had reason to believe that he was authorized to conclude the agreement on behalf of the respondents .

(4) (per **Edgar Joseph Jr FCJ**) On the evidence, the judge ought to have held that Tan, being the option holder, had the authority of the respondents to authorize Ang to act for the respondents in the agreement. The scope of Tan's authority was spelt out in the

option to sell, and although he was not called as a witness, the statements attributed to him were the statements in the nature of admissions, implied if not express, of one who was in privity with parties to the suit. It is clear law, that not only admissions made personally by the party, but also admissions by those in privity with the party are admissible as exceptions to the hearsay rule. Agents acting within the scope of their authority are those in privity, under s 18(1) of the Act.

(5) (per **Edgar Joseph Jr FCJ**) Insofar as proof that Tan was the agent of both the respondents was concerned, the case against the second respondent was stronger, because the option was only signed by the second respondent, and not the first respondent. The law is also clear that out-of-court admissions by co-parties in legal proceedings are not admissible against a joint party simply by virtue of their joinder as parties. However, having regard to the evidence in this case, it could be inferred that Tan was the duly authorized agent of both the respondents, and thus, his out-of-court statements were admissible against both the respondents.

(6) (per **Edgar Joseph Jr FCJ**) The judge had also omitted to take into account that the first respondent's testimony was tainted by a lie when evaluating the oral testimony of the first respondent.

(7) (per **Edgar Joseph Jr FCJ**) The inaction and delay on the part of the respondents to challenge the authority of the firm to bind them contractually was not merely inconsistent with the respondents' version of the facts and consistent with the appellants' version, but was also relevant to show that even if Ang did not have prior authority to bind the respondents contractually in the matter of the sale and purchase of the land, there was an inference of ratification by acquiescence and adoption that could be drawn.

(8) (per **Edgar Joseph Jr FCJ**) This case came within the range of cases where the trial judge had, in arriving at his findings of fact, either failed to take into account or to give proper weight to the material circumstances and probabilities of the case. Consequently, his judgment could not stand.

[Bahasa Malaysia summary

Penentang-penentang, yang merupakan dua orang adik-beradik, juga merupakan tuan punya berdaftar sebidang tanah di Seberang Perai Selatan ('tanah itu'). Sebelum 18 April 1990, seorang lagi adik lelaki kepada penentang-penentang, En Tan Weng Hock ('Tan'), yang telah diberikan opsyen untuk menjual tanah oleh penentang-penentang, berjumpa dengan En CP Ang ('Ang') dari Tetuan CP Ang & Co ('firma itu'), supaya Ang bertindak sebagai peguamcara penentang-penentang dalam suatu urusniaga jual beli tanah tersebut. Walau bagaimanapun, opsyen Tan untuk menjual tanah itu hanya

ditandatangani oleh penentang kedua. Selepas itu, peguamcara untuk pihak pembeli ('perayu-perayu') telah menghantar sesalinan draf perjanjian jual beli tanah tersebut ('perjanjian itu') kepada Ang, yang telah mengarahkan Tan untuk memberikannya kepada penentang-penentang untuk penelitian. Ang memberikan keterangan bahawa dia telah diberitahu oleh keraninya (yang tidak dipanggil sebagai saksi) bahawa salah seorang daripada penentang-penentang telahpun mengarahkannya untuk mendapatkan salinan bersih perjanjian itu dan deposit 10% daripada peguamcara perayu-perayu ('bahagian pertama testimoni yang diberi oleh Ang'). Ini telah dilakukan oleh firma itu dalam suratnya yang bertarikh 15 Mei 1990, dan ia telah diakui oleh penentang-penentang. Selepas firma itu menerima salinan perjanjian formal yang sudah siap dan deposit, penentang-penentang pun datang ke pejabat Ang. Mengikut Ang, dia telah diberitahu oleh keraninya bahawa apabila penentang-penentang disuruh membayar fee undang-undang, mereka mengatakan bahawa Tan yang merupakan pemegang opsyen adalah orang yang patut membayar ('bahagian kedua testimoni yang diberi oleh Ang'). Mereka menambah bahawa mereka ingin membincangkan perkara itu dengan Tan dahulu, sebelum menandatangani perjanjian itu. Walau bagaimanapun, penentang-penentang pula mengatakan bahawa mereka enggan menandatangani perjanjian itu, kerana mereka tidak menyedari tentang perkara itu. Pada 18 Jun 1990, penentang-penentang menulis kepada firma itu untuk melepaskannya daripada mewakili mereka. Firma itu juga telah diminta untuk mengembalikan dokumen hakmilik keluaran tanah itu yang berada dalam jagaannya kepada Tetuan Goik Ah Kim & Co, yang telah dilantik sebagai peguamcara baru penentang-penentang. Pada 17 Ogos 1990, barulah penentang-penentang menulis kepada firma itu untuk memberitahunya bahawa mereka tidak akan membayar fee undang-undang, kerana firma itu tidak diberi kuasa untuk bertindak bagi pihak mereka. Adalah penting untuk mengambil perhatian bahawa, sesungguhnya, penentang-penentang telah menjumpai pembeli baru untuk tanah itu pada harga yang jauh lebih tinggi sebelum pertikaian ini timbul. Perayu-perayu tidak berpuas hati, lalu memulakan guaman untuk pelaksanaan spesifik perjanjian itu. Hakim perbicaraan memihak kepada penentang-penentang, atas alasan bahawa firma itu tidak diberi kuasa untuk menyempurnakan perjanjian itu untuk mereka. Perayu merayu. Isu-isu yang harus diputuskan oleh mahkamah ialah: (i) sama ada penentang-penentang telah memberi kuasa kepada firma itu untuk menyempurnakan kontrak jual beli dengan perayu-perayu; dan (ii) sama ada inferens boleh dibuat daripada keterangan bahawa penentang telah meratifikasikan urusniaga yang firma itu tidak diberi kuasa itu.

Diputuskan, membenarkan rayuan itu:

(1) (oleh **Edgar Joseph Jr HMP**) Sama ada seorang peguamcara mempunyai kuasa sebenar atau zahir untuk mengikat kliennya secara kontraktual merupakan satu soalan fakta dalam setiap kes.

A Beban untuk membuktikan kuasa tersebut terletak di atas pihak yang mengatakan kuasa tersebut wujud.

(2) (oleh **Edgar Joseph Jr HMP**) Kuasa seorang peguamcara berasal daripada retainer yang diberikan oleh kliennya. Ekoran itu, kuasanya untuk bertindak adalah tertakluk kepada sebarang syarat B khusus yang dikenakan, dan adalah ditambah oleh sebarang kuasa khas yang diberikan oleh retainer. Secara umum, seorang peguamcara tidak mempunyai kuasa am untuk mengikat kliennya secara kontraktual sebagai penjual atau pembeli tanah, melainkan jika kuasa itu telah diberikan kepadanya secara nyata, atau ianya terkandung secara tersirat dalam terma retainer.

C (3) (oleh **Edgar Joseph Jr HMP**) Hakim perbicaraan telah menganggap bahagian pertama dan kedua testimoni yang diberi oleh Ang sebagai dengar cakap, kerana kerani Ang yang membuat kenyataan-kenyataan yang terkandung dalam testimoni tersebut tidak dipanggil sebagai saksi. Walau bagaimanapun, dengan D mengambil kira pengakuan peristiwa yang berkenaan oleh penentang-penentang, yang merupakan pihak dalam guaman ini, bahagian pertama testimoni yang diberi oleh Ang patut diterima, atas prinsip bahawa jika satu pihak dalam guaman sivil mengatakan bahawa dia tidak mempertikaikan kebenaran sesuatu E fakta, pihak yang bertentangan tidak perlu lagi membuktikan fakta tersebut. Bahagian kedua testimoni itu juga patut diterima mengikut s 14 Akta Keterangan 1950 ('Akta itu'), kerana kenyataan itu relevan untuk menunjukkan keadaan fikiran Ang, iaitu dia mempunyai sebab untuk mempercayai bahawa dia berkuasa untuk menyempurnakan perjanjian itu bagi pihak F penentang.

(4) (oleh **Edgar Joseph Jr HMP**) Mengikut keterangan yang diberikan, hakim perbicaraan sepatutnya memutuskan bahawa Tan, yang merupakan pemegang opsyen, berkuasa seperti penentang-penentang, untuk memberi kuasa kepada Ang untuk G bertindak bagi pihak penentang-penentang dalam perjanjian itu. Skop kuasa Tan telah dinyatakan dalam opsyen untuk menjual itu, dan walaupun Tan tidak dipanggil sebagai saksi, kenyataan-kenyataan yang dikatakan telah dibuat olehnya adalah kenyataan-kenyataan yang bersifat pengakuan, secara tersirat, jika bukan secara nyata, oleh seseorang yang privity dengan pihak-pihak H dalam guaman. Adalah undang-undang jelas, bahawa bukan hanya pengakuan yang dibuat oleh sesuatu pihak itu sendiri, tetapi juga pengakuan yang dibuat oleh mereka yang privity dengan pihak tersebut boleh diterima, sebagai pengecualian kepada rukun dengar cakap. Ejen yang bertindak dalam skop I kuasa mereka merupakan orang yang privity, mengikut s 18(1) Akta itu.

(5) (oleh **Edgar Joseph Jr HMP**) Berkenaan dengan bukti bahawa Tan adalah ejen kedua-dua orang penentang, kes terhadap penentang kedua adalah lebih kukuh, kerana opsyen tersebut

hanya ditandatangani oleh penentang kedua dan bukan penentang pertama. Undang-undang juga adalah jelas bahawa pengakuan di luar mahkamah oleh pihak bersama dalam prosiding undang-undang tidak boleh diterima untuk menentang satu pihak bersama semata-mata kerana percantuman mereka sebagai pihak bersama. Walau bagaimanapun, mengikut keterangan dalam kes ini, boleh diinfer bahawa Tan adalah ejen yang telah diberi kuasa oleh kedua-dua orang penentang. Maka, kenyataan yang dibuatnya di luar mahkamah oleh Tan boleh diterima untuk menentang kedua-dua penentang itu.

(6) (oleh **Edgar Joseph Jr HMP**) Hakim perbicaraan juga telah gagal mengambil kira bahawa testimoni penentang telah dicemari oleh kata-kata bohong apabila beliau memeriksa testimoni lisan penentang pertama.

(7) (oleh **Edgar Joseph Jr HMP**) Ketiadaan tindakan dan penangguhan pihak penentang untuk mencabar kuasa firma itu untuk mengikat mereka secara kontraktual bukan sahaja tidak konsisten dengan versi fakta penentang-penentang dan konsisten dengan versi perayu, tetapi juga menunjukkan bahawa walaupun Ang tidak diberi kuasa sebelum itu untuk mengikat penentang-penentang secara kontraktual dalam hal jual beli tanah itu, inferens ratifikasi secara akuiesens dan penerimaan boleh dibuat.

(8) (oleh **Edgar Joseph Jr HMP**) Kes ini termasuk dalam kelompok kes di mana hakim perbicaraan telah, dalam mencapai keputusan mengenai fakta, gagal mengambil kira atau memberi perhatian yang sewajarnya kepada keadaan yang material dan kebarangkalian kes. Oleh itu, keputusannya tidak boleh dikekalkan.]

Notes

For cases on retainer, see 9 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1683–1702.

For cases on hearsay, see 7 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1004–1066.

For cases on admission, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 170–171.

Cases referred to

Benmax v Austin Motor Co [1955] AC 370; [1955] 1 All ER 326; [1955] 2 WLR 418 (refd)

Bowen v D'Orleans (DUC) (1900) 16 TLR 266 (refd)

Brogden v Metropolitan Rly Co (1887) 2 AC 666 (refd)

D'Silva v Lister House Development [1970] 1 All ER 858; [1970] 2 WLR 563 (refd)

Gavaghan v Edwards [1961] 2 QB 220 (refd)

Khoo Sit Hoh v Lim Thean Tong [1912] AC 323 (folld)

Koenigsblatt v Sweet [1923] 2 Ch 314 (refd)

Lockett v Norman-Wright [1925] Ch 56 (refd)

A *Maclean v Cunn* (1928) 1 Mod 761 (refd)
Morison v London, County and Westminster Bank Ltd [1914] 3 KB 356 (refd)
Nash v O'Donnel [1927] NZLR 192 (refd)
Rutherford v Rutherford [1923] AC 1 (refd)
B *Soames v Spencer* (1822) 1 Dow & Ry KB 32 (refd)
Storer, Re (1884) 26 Ch D 189 (refd)
Sundram v Arujunan & Anor [1994] 3 MLJ 361 (refd)
Wall v Cockerell (1836) 10 HL Cas 229 (refd)
Watt (or Thomas) v Thomas [1947] AC 484 (folld)

C **Legislation referred to**

Evidence Act 1950 ss 14, 18(1)
National Land Code 1965 s 215
Law of Property Act 1925 s 40 [UK]

D **Appeal from**: Civil Suit No 22–436–1990 (High Court, Pulau Pinang)

Karin Lim (*Lim Leng Han & Co*) for the appellants.
Kueh Yeow Jee and *Lau Kok Guan* (*Lau Kok Guan & Partners*) for the respondents.

E

8 November 1995

Edgar Joseph Jr FCJ: The issues in the action, which led up to this appeal, may be summarized thus:

F (1) Did the respondents to this appeal, who are both brothers and the registered proprietors of certain land comprised in Lot 532, Mukim 7, Daerah Seberang Perai Selatan, in area four acres three roods 0.5 poles ('the land') authorize Messrs CP Ang & Co, Advocates and Solicitors, to conclude a contract of sale and purchase, in respect of the same, on behalf of the respondents and in favour of the appellants
G who are also both brothers?

(2) If not, whether it could be reasonably inferred, from the evidence of the surrounding circumstances, that the respondents had ratified the unauthorized bargain struck by Messrs CP Ang & Co?

H In the court below, the judge answered the first question in favour of the respondents and dismissed the appellants' suit for specific performance of the contract of sale and purchase of the land. However, he did not answer the second question. From the whole of that decision, the present appeal has been brought.

It would be more convenient if I were to refer to the appellants, as the I first and second plaintiffs, and the respondents, as the first and second defendants, respectively, unless the context otherwise requires.

Before us, the whole of the material evidence was carefully examined, and it is therefore unnecessary to discuss it again at any length.

Suffice it to say, that it is a question of fact in each case, whether a solicitor has actual or ostensible authority, to bind his client contractually. His authority is limited by his instructions — also a question of fact — and the burden of proof of establishing such authority, in common with all cases of agency, must rest on the party alleging the agency.

Clearly, therefore, this was an appeal against findings of fact which turned, to some extent, upon the credibility of the parties and their witnesses, and also on inferences to be drawn from the primary facts.

I was, therefore, mindful of the principles enunciated by their Lordships of the judicial committee of the Privy Council as long ago as 1912 in *Khoo Sit Hoh v Lim Thean Tong* [1912] AC 323, and *Benmax v Austin Motor Co* [1955] AC 370; [1955] 1 All ER 326; [1955] 2 WLR 418, applied by the majority in *Sundram v Arujunan & Anor* [1994] 3 MLJ 361.

In *Khoo Sit Hoh*, their Lordships said this (at p 325, para 2):

> The case was tried before the judge alone; it turned entirely on questions of fact, and there was plain perjury on one side or the other. Their Lordships' board are therefore called upon, as were also the Court of Appeal, to express an opinion on the credibility of conflicting witnesses whom they have not seen, heard, or questioned. In coming to a conclusion on such an issue their Lordships must of necessity be greatly influenced by the opinion of the learned trial judge, whose judgment is itself under review. He sees the demeanour of the witnesses, and can estimate their intelligence, position, and character in a way not open to the courts who deal with later stages of the case. Moreover, in cases like the present, where those courts have only his note of the evidence to work upon, there are many points which, owing to the brevity of the note, may appear to have been imperfectly or ambiguously dealt with in the evidence, and yet were elucidated to the judge's satisfaction at the trial, either by his own questions or by the explanations of counsel given in presence of the parties. Of course, it may be that in deciding between witnesses he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or has given credence to testimony, perhaps plausibly put forward, which turns out on more careful analysis to be substantially inconsistent with itself, or with indisputable fact, but except in rare cases of that character, cases which are susceptible of being dealt with wholly by argument, a Court of Appeal will hesitate long before it disturbs the findings of a trial judge based on verbal testimony.

In *Sundram*, when speaking for the majority of the Supreme Court, I had said this (at p 373F to H):

> ... We recognize, as we must, that a Court of Appeal will naturally be reluctant to interfere with a finding of fact by the trial judge who has had the inestimable advantage of watching the demeanour of the witnesses, 'their candour or their partisanship, and all the incidental elements so difficult to describe which make up the atmosphere of an actual trial' (per Lord Macmillan in *Watt (or Thomas) v Thomas* [1947] AC 484 at pp 490–491; [1947] 1 All ER 582 at p 590). But, having said that, we would draw attention to the familiar principle that there is a distinction between the finding of a specific fact and the finding of a fact which is really an inference

A drawn from the facts specifically found. In the latter case — and the present case is such a case — the appellate court will be far more ready to reverse his decision founded as it is on inferences drawn from admitted or undisputed facts. (See *Benmax v Austin Motor Co* [1955] AC 370; [1955] 1 All ER 326; [1955] 2 WLR 418.)

B It was with the above principle in mind that I approached the questions for decision in this appeal.

The ground upon which the judge in the court below had dismissed the plaintiff purchasers' suit for specific performance was that the legal firm of Messrs CP Ang & Co did not have the authority to bind the defendant owners contractually in the matter of the sale and purchase of C the land.

Now, a solicitor's authority flows from the retainer given to him by his client. It follows that his authority to act is limited by any special conditions imposed and supplemented by any special authority conferred by the retainer (*Re Storer* (1884) 26 Ch D 189).

D Generally, a solicitor has no general authority to bind his client contractually as a proposing vendor or purchaser of land unless such authority is expressly conferred upon him or is implicit in the terms of the retainer. If any authority is needed for this proposition, then I need no more than refer to the cases of *Lockett v Norman-Wright* [1925] Ch 56 at E p 62, and *D'Silva v Lister House Development* [1970] 1 All ER 858 at p 866; [1970] 2 WLR 563 at p 573.

Another case to which I should like to refer, in this context, is *Gavaghan v Edwards* [1961] 2 QB 220, where a proposing purchaser refused to complete and the vendor sued the purchaser for damages for F breach of contract, and the question was whether there was a memorandum of the contract as required by s 40 of the Law of Property Act 1925 (no local equivalent, but does not affect the point at issue here), Dankwerts LJ delivering the judgment of the Court of Appeal in England said this at p 226:

G Now, it is no doubt correct (and there are cases which so hold) that the mere fact of the relationship of solicitor and client being constituted in regard to a particular purchase does not by implication give a solicitor any authority to make a contract or to sign a memorandum, and I may refer to *Forster v Rowland* (1861) 7 H&N 103 and *Smith v Webster* (1876) 3 Ch D 49 CA. But that is not a hard and fast rule which is not capable of alteration. H On the facts of the case, as it seems to me, from the way in which the instructions are given to the solicitor, he may by implication be entitled to sign a memorandum which will bind his client.

There is also authority for saying that when a solicitor is employed to approve of or settle the draft form of an agreement (*Brogden v Metropolitan Rly Co* (1887) 2 AC 666) or to put it in shape (*Bowen v D'Orleans (DUC)* I (1900) 16 TLR 266), and he writes the word 'approved' at the end of the draft, it is an approval of the mere form of the draft and not its substance. On the other hand, where a solicitor has been authorized to receive the

purchase price and complete the transaction he is thereby authorized to approve of the transfer, and the solicitor's letter accompanying the same, bearing his signature, will constitute an authorized signature. (See *Nash v O'Donnel* [1927] NZLR 192.)

In the court of trial, Mr CP Ang ('Ang'), advocate and solicitor and the sole proprietor of the legal firm of Messrs CP Ang & Co, was called as a witness for the plaintiffs.

By way of preliminary, Ang testified, without serious challenge, as follows:

> Prior to 18 April 1990, brother of defendants Tan Weng Hock came to my office with two plaintiffs. They said they were interested in the land. I asked the brother on what authority he was acting for the defendants. He said the defendants had given or is about to give him an option for the sale of the land. Tan Weng Hock told me that the defendants were either living in JB or KL. It was inconvenient for them to come to Penang.

Perhaps, appreciating that it would be most unwise for him to act for both the purchasers and the vendors in the matter of the proposed sale and purchase transaction, he added, 'I told plaintiffs (purchasers) to go to their lawyer — ie Tan Boon Lin.'

Similarly, Ang also recognized the importance of his receiving direct instructions from the defendants, for he added, 'I told the parties I must see the defendants personally or that they must convey instruction directly to my office.'

Ang further testified that he did see an option to sell the land signed by the second defendant only, though not by the first defendant, made out in favour of Tan Weng Hock, and produced by the latter. That there was such an option, at the material time, was common ground, and indeed, such an option was tendered in evidence and read as follows:

> 30 April 1990
>
> Tan Weng Hock
> No 672 Sungei Kecil
> Nibong Tebal
>
> Option of sale
>
> In consideration of the sum of RM1, we hereby grant the option of sale of property relating to Lot 532, Mukim 7, SPS at RM58,000 per acre.
>
> We further agreed to give you 2% of the purchase price as commission upon the successful completion of the sale of the aforesaid property.
>
> 1. Tan Chiah Hock
> 2. Tan Chin Hock (–Sgd–)
>
> (both of No 672, Sungei Kecil, Nibong Tebal, Seberang Perai Selatan)

Subsequently, Ang testified that he had communicated with the solicitors for the plaintiffs purchasers 'to tell his clients to go and discuss the terms and if they agree to prepare and send the draft sale and purchase agreement to me'.

Later, the draft sale and purchase agreement prepared by Messrs Tan Boon Lin & Co, the solicitors for the plaintiffs, did reach the hands of Ang who then passed it on to Tan Weng Hock when the latter called at his office with a direction 'to convey the whole agreement to the defendants for their agreement'.

Still later, Ang testified — and this was *admitted* by the defendants — that:

> One of the two defendants called on my conveyancing clerk, S Rajaratnam. He told my clerk *to call for a fair copy of sale and purchase agreement and 10% of purchase price as deposit.* They said as they were coming from far away *they wanted to see the fair copy of the agreement and the 10% deposit.* (Emphasis added.)

The judge considered that this part of the testimony of Ang was hearsay and, therefore, inadmissible as S Rajaratnam was not called as a witness. With respect, having regard to the *admission* of these events by the defendants who were parties to the suit, this part of the testimony of Ang should have been admitted on the principle that if a party to a civil suit says he does not dispute the truth of a fact the court will naturally not require the opposite party to prove such fact.

It is also noteworthy that the contemporary correspondence was consistent with Ang's version for, by a letter dated 15 May 1990, Messrs CP Ang & Co wrote to Messrs Tan Boon Lin & Co as follows:

> Your ref: TBL/PT/60/90 15 May 1990
> Our ref: CPA/CON/103/90
>
> Messrs Tan Boon Lin & Co
> Advocates and Solicitors
> No 63 Jalan Aston
> First Floor
> 14000 Bukit Mertajam
>
> Dear Sirs
>
> Re: Lot No 532, Mukim 7, Seberang Perai Selatan
>
> We refer to your letter dated 25 April 1990 and return herewith the proposed copy of the sale and purchase agreement for your further action.
>
> Kindly let us have the fair copy of the same together with the sum of Ringgit Twenty Nine Thousand One Hundred and Sixty Five and cents Sixty Two (RM29,165.62) being 10% deposit of the purchase price of the above property.
>
> Thank you.
>
> Yours faithfully
> —Sgd—

In response to that letter, Messrs Tan Boon Lin & Co did send to Messrs CP Ang & Co, not only the engrossed copy of the sale and purchase agreement but also the 10% deposit by way of a bank draft which was duly paid into the latter's clients' account at the bank. Furthermore, Ang had

custody of the issue document of title, at the material time, a cogent fact, which was wholly consistent — given the circumstances — with his having been duly authorized to bind the defendants contractually. A

Be that as it may, the defendants did, after Messrs CP Ang & Co had received the engrossed copy of the sale and purchase agreement and the 10% deposit, call at the latter's office — that much was admitted by the defendants. There was, however, an acute conflict of evidence, as to what had transpired there. B

According to Ang, who freely admitted that he did not personally see the defendants or either of them — when asked to settle his professional fees, they claimed that their brother Tan Weng Hock — who was the option holder — should do so. They added that they would go back and consult Tan Weng Hock to sort this matter out before they signed the sale and purchase agreement. These facts were apparently conveyed to Ang by his conveyancing clerk S Rajaratnam who, it will be recalled, was not called as a witness. In my view, evidence of these statements allegedly made by S Rajaratnam to Ang was admissible evidence of the state of mind of Ang; the statements being relevant to show that Ang had reason to believe that he was authorized to conclude the contract of sale and purchase on behalf of the defendants. (See s 14 of the Evidence Act 1950.) As stated in 17 *Halsbury's Laws of England* (4th Ed) at p 39 para 53: C D

> Hearsay evidence in its legal sense is evidence given by a testifying witness of a statement made on some other occasion, when it is intended as evidence of the truth of what was asserted. It is essential to appreciate that evidence is only hearsay when tendered to prove the truth of the facts asserted, not when tendered simply to show that the statement was made. E

The judge was, therefore, wrong in disregarding evidence of these statements by the clerk S Rajaratnam to Ang. F

On the other hand, the defendants whilst admitting that they did call at the office of Messrs CP Ang & Co, on this occasion, went on to give a different version of what had transpired there. According to them, Ang did not ask for his fees, on that occasion, and they did not sign the sale and purchase agreement because they did not know anything about it. However, despite the gravity of the matter, neither defendant wrote any letter to Messrs CP Ang & Co to say so. Instead, the undisputed events which followed were wholly inconsistent with their case, and it is to these events which I must now refer. G

A month passed, without incident, when according to Ang — and on this he was not challenged — Tan Weng Hock called at his office to say that the defendants suspected him (Tan Weng Hock) of making 'a big undercounter profit' and refused to sign. H

Significantly, it was not until 18 June 1990, that the defendants wrote directly to Messrs CP Ang & Co discharging them from acting for them with no mention made of his lack of authority to bind them contractually. That letter was in the following terms: I

AR Registered

A Tan Chiah Hock
Tan Chin Hock
96–3 Block-B
Bagan Sri Lempah
Lorong Jugra, Batu 3½
Jalan Kelang Lama
B 58100 Kuala Lumpur

18 June 1990

Tetuan CP Ang & Co
Advocates and Solicitors
No 18 Jalan Kg Bengali
C 12000 Butterworth

Dear Sir

Re: Lot 532 Mk 7 SPS

D We write to inform you that we have appointed Tetuan Goik Ah Kim & Co, of No 1668 (1st Floor) Jalan Atas, 14300 Nibong Tebal, Seberang Perai Selatan to be our solicitors who would be in charge on all matters pertaining to the above property. We understand that you are now having custody of the advanced certificate of title, and in the circumstances, we appreciate if you can kindly hand over the issue document of title to Tetuan Goik Ah Kim & Co as soon as possible.

E Yours faithfully
—Sgd—
—Sgd—
cc

Messrs Goik Ah Kim & Co
F Advocates and Solicitors
1668 (1st Floor) Jalan Atas
14300 Nibong Tebal
Seberang Perai Selatan.

Please take further action on this matter.

G One may well ask, if there had been any substance in the defendant's complaint that they had not engaged Messrs CP Ang & Co to act for them in the matter of the sale and purchase of the land to the plaintiffs, why then was it necessary to discharge Messrs CP Ang & Co from doing so?

H It was not until 17 August 1990, that the second defendant wrote to Messrs CP Ang & Co refusing to pay their bill for professional services rendered in the matter of the sale and purchase transaction on the ground that they were not authorized to act on behalf of himself and the first defendant. That letter was in the following terms:

I Tan Chin Hock
96–3, Blk B
Bangunan Sri Lempah
Lorong Jugra
Batu 3½, Jalan Kelang Lama
58100 Kuala Lumpur

17 August 1990
Your ref: NT/FNT/532/7/S

Messrs CP Ang & Co
Advocates and Solicitors
18 Leboh Kampung Benggali
12000 Butterworth
Seberang Perai

Dear Sir

Re: Lot 532, Mukim 7, Seberang Perai Selatan

Refer to the letter from Messrs Goik Ah Kim dated 9 August 1990 (and a copy of letter from you to Messrs Goik Ah Kim).

Refer to your request for payment (a) & (b), we are fully aware that we did not engage you to do the approval of draft sale & purchase agreement nor any correspondence to Messrs Tan Boon Lim & Co. Furthermore, we did not issue any option for sale to any broker.

Regarding the application for final title, we are herewith attached a photocopy of payment received to your office for your perusal. Kindly let us know why we should pay for the said fee.

Thank you.

Yours faithfully
—Sgd—

cc
1) Tan Chiah Hock
37A & 27B
Jln Persisiran Perling
Taman Perling
81200 Johor Baru
Johor.

2) Tetuan Goik Ah Kim & Co
No 1668 (1st Floor), Jalan Atas
14300 Nibong Tebal
Seberang Perai Selatan.

This was the first intimation in writing by the defence — coming only from the second defendant but not the first defendant — challenging the authority of Messrs CP Ang & Co to act on their behalf in the matter of the sale and purchase of the land and, it came, after a time lag of some two months from the time the defendants had called at the offices of Messrs CP Ang & Co and declined to sign the sale and purchase agreement. This inaction and delay on the part of the defendants in such a serious matter as challenging the authority of Messrs CP Ang & Co was a cogent fact, wholly inconsistent with the case for the defendants, bearing in mind that they were not country yokels but seasoned businessmen, and was clearly overlooked by the judge. Indeed, the defendants had by 26 June 1990 consulted the legal firm of Messrs Goik Ah Kim & Co, who had by a letter of that date addressed to Messrs CP Ang & Co, as solicitors for the defendants, merely asked for the return of the issue document of title of the land but, significantly, not a word was mentioned about their lack of authority to act for the defendants in the matter of the sale and purchase transaction.

A It is also material to note that although it was as early as 13 August 1990 that Ang sent copies of the sale and purchase agreement to Messrs Goik Ah Kim & Co, the latter did not return it to Ang until 12 January 1991, saying that Ang's firm did not have authority to act for the defendants — a time lag of some five months.

B In point of fact, the defendants, had consulted Messrs Goik Ah Kim & Co in the fourth week of June 1990 because, by then, they had found a new purchaser for the land at a considerably higher price and, it was only thereafter — perhaps understandably — that the dispute arose which led to the present litigation. The judge should have, but did not, ask himself, whether the entry on the scene of a new purchaser at a higher price might C have been a factor which caused the defendants to renege on the agreement.

There was another point arising from the defendants having found a new purchaser for the land which went to undermine the credibility of the first defendant. According to the testimony of the first defendant, when he 'made the second sale' he had 'engaged Mr Goik' and 'was not aware of D the first sale transaction' and 'therefore he did not suspect any problem'. But, the testimony of his brother the second defendant, that prior to consulting Goik, both he and the first defendant had called at Ang's office and obtained a copy of the sale and purchase agreement for purposes of the sale to the plaintiffs went to show clearly that the first defendant had E already known of 'the first sale transaction' when he consulted Goik. It is obvious, therefore, that the first defendant's testimony was tainted by a proven lie, and that his credibility when tested on this point must be found wanting, yet the judge omitted to take this into account when evaluating the oral testimony of the first defendant.

Upon the evidence, the judge ought to have held that the option F holder Tan had the authority of both his brothers, the defendants, to authorize Ang to act for the defendants in the matter of the sale and purchase agreement. Ang said that he saw the option when Tan produced it and instructed him. The scope of Tan's authority was spelt out in the option to sell. Although Tan was not called, the statements attributed to G him were the statements in the nature of admissions, implied if not express, of one who was in privity with parties to the suit, to wit, the first and the second defendants, as evidenced by the surrounding circumstances hereinbefore referred to.

It is clear law, that not only admissions made personally by the party, H but also admissions by those in privity with the party are admissible, as exceptions to the hearsay rule. The most important examples of those in privity are predecessors in title, referees, and servants *or agents acting within the scope of their authority*. (See s 18(1) of the Evidence Act 1950.)

Evidence of these admissions was also admissible on the broader ground that if a party to a civil suit says that he does not dispute the truth I of a fact, the court will not require the opposite party to prove such fact.

At this point, I must interpolate to add that insofar as proof that Tan was the agent of both the defendants in the matter of the sale of the land was concerned, the case against the second defendant was stronger than that against the first defendant, because of the existence of the option to sell in writing signed by the second defendant but *not* by the first defendant.

Indeed, before us, counsel for the defendants conceded that the appeal should be allowed insofar as the second defendant was concerned though not, of course — so he argued — insofar as the first defendant was concerned. A

In my view, however, having regard to the evidence of the surrounding circumstances, hereinbefore mentioned, there was sufficient material, from which it could be inferred that Tan was the duly authorized agent of *both* the defendants for the *purpose* of selling the land, upon the terms stated in the option in writing. B

I recognized that it was important to consider the case against each defendant separately, not only as regards the general issue of whether the first defendant had incurred contractual liability to sell the land to the plaintiffs, but also as regards the issue whether evidence of the statements by Tan to Ang were admissible as against the second defendant only or as against *both* the defendants. C

On this latter point of admissibility, the law is clear that out-of-court admissions by co-parties in legal proceedings are not admissible against a joint party *simply* by virtue of their joinder as parties. In other words, for such evidence to be admissible against a joint party, there must be something more than the mere fact of such joinder. To illustrate, see *Rutherford v Rutherford* [1923] AC 1 at p 10 which shows that a respondent may be found to have committed adultery with the co-respondent but the co-respondent is not *thereby* proved to have committed adultery with the respondent. D E

In the present case, however, as I have already said, I was satisfied, having regard to the evidence of the surrounding circumstances, hereinbefore mentioned, that there was sufficient material from which it could be inferred that Tan was the duly authorized agent not only of the second defendant but also of the first defendant, for the purpose of selling the land upon the terms appearing in the option. Tan was, therefore, in privity with *both* defendants to the suit and, therefore, his out-of-court statements which were in the nature of admissions, either implied, if not express, were admissible against *both* the defendants. F G

It follows that the judge was quite wrong in treating evidence of the statements attributed to Tan, which were implied, if not express admissions, as hearsay and excluding the same from his consideration. Had the judge not erred in this respect, he would most probably, have arrived at a different decision, and so, on this ground alone, the appeal must be allowed. H

But, if I am wrong in the view I take regarding the primary ground of appeal, then there is an alternative ground upon which the appeal must succeed.

Looking back, I would say that generally, the inaction and delay on the part of the defendants to challenge the authority of Messrs CP Ang & Co to bind them contractually was not merely inconsistent with the defendants' version of the facts and consistent with the plaintiffs' version but was also relevant to show that even if Ang did not have prior authority to bind the defendants contractually, in the matter of the sale and purchase I

of the land, yet it afforded strong evidence from which an inference of ratification by acquiescence and adoption could be drawn — a point which was overlooked by the judge. I am supported in this by the following passage in 1(2) *Halsbury's Laws of England* (4th Ed) at para 82 p 60:

> Ratification by acquiescence
>
> Although a ratification must be clear and must bear distinct reference to the facts of the particular case, it need not necessarily be proved by positive acts of adoption. In certain cases it is sufficient evidence of ratification that the intended principal, having all material facts brought to his knowledge and knowing that he is being regarded as having accepted the position of principal, takes no steps to disown that character within reasonable time, or adopts no means of asserting his rights at the earliest time possible.

It is settled law that where a solicitor purports, without authority, to make a contract, his client can subsequently, ratify it (see *Koenigsblatt v Sweet* [1923] 2 Ch 314). A ratification of a contract by a principal relates back to the time when it was made by the agent (see *Maclean v Cunn* (1928) 1 Mod 761) and a verbal ratification is sufficient (see *Soames v Spencer* (1822) 1 Dow & Ry KB 32). The burden of proving such ratification lies on the party alleging it, and he must also prove full knowledge of facts. (See *Wall v Cockerell* (1836) 10 HL Cas 229 at p 243; *Morison v London, County and Westminster Bank Ltd* [1914] 3 KB 356 CA.)

In my view, upon the undisputed evidence, the plaintiffs had discharged this burden, so that even if, contrary to my opinion, Ang did not have prior authority to bind the plaintiffs, contractually, in the matter of the sale and purchase of the land, there was clear evidence from which an inference of ratification by acquiescence could be drawn.

Before us, no attempt had been made by counsel for the defendants to support the decision of the court below on the ground that even assuming Ang was authorized, (whether previously or by subsequent ratification) to bind the defendants contractually, no concluded contract was in fact entered into. In my view, counsel for the defendants was quite correct in not having done so.

For the reasons stated, I was completely convinced that the present appeal came within the range of those cases where, because the judge had, in arriving at his findings of fact, either overlooked, or failed to take into account or to give proper weight to, material circumstances and the probabilities of the case (see *Khoo Sit Hoh*'s case), we are entitled to conclude that he had not taken proper advantage of his having seen and heard the witnesses (per Lord Thankerton in *Watt (or Thomas) v Thomas* [1947] AC 484 at pp 487–488), with the result that his judgment cannot stand.

In the result, we unanimously held that the appeal should be allowed with costs here, and in the court below, the judgment of the High Court set aside and that there be substituted, in lieu thereof, judgment for the plaintiffs for specific performance of the agreement of sale and purchase, concerned. The following consequential orders in favour of the plaintiffs were also made, namely that:

(1) upon payment of the full purchase price by the plaintiffs to the defendants or their solicitors, within two months from the date of order, the defendants do execute a valid and registrable transfer in Form 14A prescribed under s 215 of the National Land Code 1965 ('the Code') of the land, free form all encumbrances, and with vacant possession, failing which the registrar of the High Court Penang be authorized to do so;

(2) the defendants or whosoever has custody or control or possession of the issue document of title of the land, do deposit the same with the plaintiffs' solicitors, within the like period referred to in para (1); and

(3) the proper registering authority, upon presentation of the duly executed transfer aforesaid and the issue document of title, do register the same in the manner prescribed by the Code.

The deposit paid into court by way of security for the costs of the appeal was ordered to be refunded.

18 November 1995

Mohamed Dzaiddin FCJ: I have had the opportunity of reading the judgment of my brother, Edgar Joseph Jr FCJ, and, for the reasons stated therein, agree with his conclusion that the appeal should be allowed with costs here and below and further consequential orders stipulated in the aforesaid judgment.

8 November 1995

Abu Mansor JCA: I have had the opportunity of reading the draft judgment of my brother, Edgar Jospeh Jr FCJ, in this matter to which I concur.

Appeal allowed.

Reported by Prof Ahmad Ibrahim